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# EMPLOYMENT LAW BULLETIN

**JULY 2023**

## Welcome to Wrigleys' Employment Law Bulletin, July 2023.

Welcome to the July edition of our Employment Law Bulletin. Although the holiday season is now well underway, our articles this month include some key developments in family and care-related protections and flexible working which look set to have a significant impact on employers and employees.

In our first article, **New laws providing additional support to parents and carers receive Royal Assent**, we take a look at three pieces of legislation which have completed their passage through Parliament and are expected to come into force within the next two years. These laws provide additional employment rights and protections for working parents and carers.

In our second article, we highlight the ongoing **ACAS consultation on draft flexible working Code of Practice**. As the Employment Relations (Flexible Working) Act 2023 has now received Royal Assent and is expected to come into effect in the next year, ACAS has issued a consultation on the proposed Code of Practice for handling flexible working requests.

We also include an article from our employee ownership team on the ongoing **HMRC Consultation on Employee Ownership Trusts (EOTs) and Employee Benefit Trusts (EBTs)**.

Our case law report this month looks at the interesting case of ***Higgs v Farmor's School*** in which the EAT considered whether a school employee's Facebook posts about relationships and sex education could be a manifestation of her protected religious and philosophical beliefs.

Our next virtual **Employment Brunch Briefing** takes place on **1 August** and is an interactive session using a case study to consider some of the trickier aspects of the redundancy process. Please click on the link below to register.

– Alacoque Marvin, Editor **alacoque.marvin@wrigleys.co.uk**

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# New laws providing additional support to parents and carers receive Royal Assent

***Article published on 27 July 2023***

*Package includes increased protection in redundancy scenarios and additional neonatal rights.*

On 25 May 2023 the UK government announced that three Bills had completed their passage through Parliament:

- The Neonatal Care (Leave and Pay) Act which will allow eligible employed parents whose new-born is taken into neonatal care to take up to 12 weeks of paid leave in addition to existing rights such as maternity and paternity leave;

- The Protection from Redundancy (Pregnancy and Family Leave) Act will extend existing redundancy protections for employees on maternity, adoption or shared parental leave to also cover pregnancy and a period of time after the parent has returned to work; and

- The Carer's Leave Act will create a new statutory unpaid leave entitlement for employees caring for a dependant with long-term care needs.

All three will require secondary legislation to bring them into effect. At this moment the delivery of these new instruments is tabled to happen 'in due course' and it seems likely delivery of the new protections and entitlements will not happen before April 2025.

It is not yet known for how much longer the redundancy protections will be extended, but based on past government announcements following consultation on this matter it appears likely this will extend to six months upon return from leave. The 'protection' takes the form of a right for the parent returning to work to a suitable alternative role where they are facing redundancy and to take priority for such roles over colleagues who are also facing redundancy. This protection will also apply to an employee who has recently suffered a miscarriage.

The additional redundancy measures follow 2018 research from the Equality and Human Rights Commission that showed one in nine mothers were either dismissed, made compulsorily redundant or faced such poor treatment they felt they had to leave their job. One in five mothers said they had experienced harassment or negative comments related to pregnancy or flexible working at work.

This led charities to call for even more support for parents and carers, urging the government to provide greater protections against cases of discrimination in the workplace. In tandem, the government has for serval years sought ways to try and encourage those with care responsibilities back to work and to stay in work, which it is hoped this package of measures will help to achieve.

**Comment**

This new package of legislation is a significant step in the journey towards a fairer and more inclusive workplace for carers and parents, with the new rights and protections aiming to create an environment where parents and carers can balance work with personal responsibilities.

In the time between now and the expected implementation of these measures from 2024 onwards, it is crucial employers start making their own adjustments and preparations. This will include developing familiarity with these new rights and protections and incorporating them into/ creating new policies.

# ACAS launches consultation on draft flexible working Code of Practice

***Article published on 25 July 2023***

*Consultation comes as Flexible Working Bill continues its journey through Parliament.*

The Advisory, Conciliation and Arbitration Service (ACAS) has launched a consultation on its draft of a revised Code of Practice for handling flexible working requests. The draft Code, which is available on ACAS's website here has been created to take account of the changes to the changes to the right to request flexible working that will take effect when the Flexible Working Bill and associated secondary legislation comes into effect (expected in 2024).

The right to request flexible working

Once the Act takes effect, the right to request flexible working will change in the following key ways:

- Employees will have the right to request flexible working from day one of their employment and may make two requests in any 12-month period.
- Employees will no longer need to explain how their request would affect their employer or how they will deal with the change.
- Employers will no longer be able to outright reject flexible working requests, and must consult the employee who made the request to discuss alternative arrangements.
- Employers must make a decision on flexible working requests within two months.

The new draft Code significantly expands on the existing version, not only going into greater detail on how to handle a request but also to emphasise the right to, and how to deal with, an appeal. The draft Code encourages a more positive approach from employers, underlining that requests must not be rejected by default and that employers should engage with those making requests. This includes meeting with the employee to discuss their request and event to confirm the request has been accepted.

The draft Code has also been adapted to capture the overlapping right of an employee to request a predictable working pattern, and how this might be dealt with as part of a flexible working request, whilst also flagging the specific Code for such a request.

It is important for employers to follow the ACAS Codes of Practice, as failing to do so can lead to additional liabilities. Failure to follow the Code on flexible working requests does not of itself lead to a direct liability, though a tribunal will take this into account when determining if the right to flexible working requests was infringed. It should be noted however that flexible working requests may invoke discrimination issues (flexible working is often used by those with care responsibilities) which may lead to disciplinary and grievance procedures. In that case, it is worth noting that failure to follow the ACAS Code of Practice on disciplinary and grievance procedures can result in a 25% uplift on any damages awarded by a tribunal.

Consultation

ACAS has opened a consultation to obtain feedback on its draft updated Code on flexible working requests, which closes on 6 September 2023. As noted in the foreword of the consultation, views towards flexible working have shifted significantly since the Code was originally published in 2014. The revised draft Code therefore seeks to build on this shift, highlighting the benefits to employers and employees of flexible working arrangements and taking a much more positive view towards it.

Whilst general views and input are accepted, ACAS has created 11 questions for specific feedback, varying from asking whether the tone of the Foreword properly encourages open-mindedness from

employers to specific aspects of what is in the Code and whether they should be there (for example, the reference to a the right to request a predictable working pattern).

Comment

Increased flexibility is becoming a much more regular feature in UK workplaces than it used to be. The CIPD viewpoint on flexible working, as one example, is that the COVID-19 drove an increase in working from home and hybrid working opportunities, but that more is needed to increase the uptake of flexible working arrangements.

As the CIPD highlight, flexible working has the potential to create more inclusive, diverse and productive workplaces and has inclusion and wellbeing advantages for employees that help employers to attract and retain people who might otherwise struggle to remain in employment. Whilst some 60% of employees work in roles that require them to physically be in the office, CIPD's view is that flexible working practices should be the norm and not the exception for all workers.

Arguments over whether home or office working leads to greater productivity continue, with some employers having started to pull back on flexibility, albeit with a blend of home and office working.

With the encouragement by the UK government towards flexible working, employers may well see an upsurge in flexible working requests. In such circumstances it is therefore important that the draft ACAS Code of Practice on flexible working requests provides useful guidance to help employers manage within the new legal framework. Employers should take advantage of the consultation to help the draft Code achieve this.

## HMRC Consultation on Employee Ownership Trusts (EOTs) and Employee Benefit Trusts (EBTs)

***Article published on 21 July 2023***

*The UK Government has launched an open consultation on the taxation of Employee Ownership Trusts ("EOT") and Employee Benefit Trusts ("EBT").*

On 18 July 2023 the UK Government launched a new open consultation to the employee ownership sector regarding the treatment of EOTs and EBT under the current taxation regime.

At the moment EOTs and EBTs can benefit from favourable taxation positions and obtain certain tax reliefs. HMRC are looking at some potential targeted reforms to ensure that EOTs and EBTs are being used properly, and for the benefit of the employees of the companies involved, so as to further the policy objectives which sit behind the creation of EOT and EBT companies which is to encourage employee engagement. Situations where the EOT or EBT regime have been entered into purely for the favourable tax treatment are not viewed as encouraging this employee engagement and this appears to have prompted the consultation.

In particular the consultation is aiming to field responses on 12 core questions:

1. *Do you have any comments on the proposal to prohibit former owners and connected persons from retaining control of an EOT-owned company post-sale by appointing themselves in control of the EOT trustee board?*
2. *Should the government go further and require that the EOT trustee board includes persons drawn from specific groups, such as employees or independent persons? If so, how should these groups be defined?*
3. *Do you have any comments on the proposal to require that the trustees of an EOT are UK resident as a single body of persons?*
4. *Do you have any comments on the proposal to confirm in legislation the distributions treatment*

*for contributions made by a company to an EOT to repay the former owners for their shares?*

5. *Do you have any comments on the proposal that HMRC stops giving clearances on the application of section 464A of the Corporation Tax Act 2010 to the establishment of EOTs?*
6. *Should the EOT bonus rules be eased so that tax-free bonuses can be awarded to employees without directors necessarily also having to be included, and would this undermine protections which ensure that bonus payments are not abused or weighted towards some employees?*
7. *Do the EOT bonus rules create any other unintended consequences or challenges in administering the tax-free bonus payments?*
8. *In addition to the reforms proposed at Chapters 4 to 6, do you have any views on ways the Employee Ownership Trust tax regimes could be reformed to better support employee ownership?*
9. *Do you have comments on the proposal to confirm the government's position by making it explicit in legislation that the restrictions on connected persons benefiting from EBT must apply for the lifetime of the trust?*
10. *Do you have any comments on the proposal to only allow the IHT exemption where the shares have been held for two years prior to settlement into an EBT?*
11. *Do you have any comments on the proposal that no more than 25% of employees who are able to receive income payments should be connected to the participator in order for the EBT to benefit from favourable tax treatment?*
12. *In addition to the reforms proposed at Chapter 7, do you have any views on ways the tax treatment of EBTs could be enhanced?*

Wrigleys are looking forward to taking part in the consultation ourselves, and assisting in informing HMRC's reforms to ensure they continue to put employee engagement at the heart of the EO sector.

The Employee Ownership Association is gathering input from the EO sector and shall be engaging with the consultation. Further detail can be found here.

If you wish to be part of the consultation, or to read up on what HMRC are currently proposing, you will find the full text of the consultation here.

## Was dismissal of school employee for gender-critical Facebook posts discriminatory?

***Article published on 7 July 2023***

*EAT: tribunal must consider whether dismissal was because of a justified objection to the way protected beliefs were manifested.*

Readers may have seen in the media over the last few years coverage of court cases brought by individuals alleging they have been discriminated against because of a so-called gender-critical belief. Very simply put, this is a belief that people cannot change their sex.

For further details of a recent case see School chaplain was not discriminated against because of his religious belief after preaching that pupils did not have to agree with "LGBT ideologies" (available on our website).

**Update on Forstater case**

The EAT decision in *Forstater v CGD Europe and others* published in June 2021 was an important case which held that the claimant's gender-critical beliefs were protected under the Equality Act 2010. The employment tribunal had previously found that these beliefs did not qualify for protection because they were not worthy of respect in a democratic society, incompatible with human dignity and conflicted with the fundamental rights of others. See our article Claimant's gender-critical belief is protected under the Equality Act (available on our website) for more detail on this decision.

In July 2022, an employment tribunal found that Ms Forstater had been directly discriminated against because of her beliefs when CGD decided not to renew her contract, not to offer her an employed role, and removed her profile from their website after she had posted her views on social media. The tribunal found that the claimant's tweets were a manifestation of her protected beliefs and were not done in a manner which was inappropriate or to which objection could reasonably be taken, even though they were capable of causing offence.

The tribunal last month published its remedy judgment, awarding Ms Forstater in the region of £106,000, including an injury to feelings award of £25,000, aggravated damages of £2,000, net loss of earnings of £14,000, and loss of chance of obtaining an employed role of £50,000.

**Is dismissal for expressing protected beliefs discriminatory?**

Last month, the EAT published its judgment in a further case considering disciplinary action taken against an employee who expressed gender-critical and other protected beliefs on social media.

**Case details:** ***Higgs v Farmor's School***

Mrs Higgs was a pastoral administrator and work experience manager at an academy (the school). Her role included work with pupils who had been removed from class and who might be considered vulnerable.

Mrs Higgs had expressed her views on Facebook that primary schools should not teach that all relationships are equally valid, that gender is a matter of choice, and that same sex marriage is the same as "traditional" marriage. A parent complained that Mrs Higgs' posts contained views prejudiced against LGBT people and expressed concern that she might "exert influence over the vulnerable pupils that may end up in isolation for whatever reason".

The employer carried out a disciplinary process, after which Mrs Higgs was dismissed. The reason for dismissal was that Mrs Higgs had breached the school's code of conduct by posting material which could lead readers to infer that she held discriminatory beliefs and that that there was a potential risk to the school's reputation.

Mrs Higgs brought claims of direct religion or belief discrimination and harassment in the employment tribunal.

The employment tribunal found that Mrs Higgs had protected Christian beliefs, including that marriage is a "divinely instituted life-long union between one man and one woman". She was also found to have protected lack of belief in gender fluidity, the possibility of changing biological sex/gender, and in same sex marriage.

However, the tribunal dismissed her claims, finding that the school's actions were not because of the beliefs themselves, but because the school "felt that the language used in those posts might reasonably lead someone who read them to conclude that she held views (homophobic and transphobic) that she expressly rejected".

Mrs Higgs appealed the decision and the EAT allowed her appeal, remitting the case back to the tribunal to decide the claim following the guidance provided by the EAT.

**The impact of the Human Rights Act on employment tribunal claims**

Claimants are not able to bring human rights claims in the employment tribunal and they are only able to do so in the civil courts where the respondent to the claim is a public authority for the purposes of the Human Rights Act 1998 (HRA).

However, courts and tribunals are required under the HRA to read and give effect to UK legislation in a way which is, so far as possible, compatible with the rights conferred by the European Convention on Human Rights (ECHR). In practice, this means that employment tribunals will consider human rights law where relevant when determining claims.

Where an employee has been sanctioned or dismissed for expressing their beliefs on social media, a tribunal will consider the claim in the light of protections for freedom of thought, conscience and religion under Article 9 ECHR, and freedom of expression under Article 10 ECHR. These rights are not absolute; they can be interfered with by a public authority where the restriction is prescribed by law, pursues a legitimate aim and is necessary in a democratic society.

In Mrs Higgs' case, the EAT held that the tribunal had not properly considered the claim in the light of these human rights.

The tribunal should first have considered whether the claimant's social media posts were a manifestation of her protected beliefs, in that there was a sufficiently close or direct connection between Mrs Higgs' protected beliefs and her Facebook posts. The EAT stated that, if it had done so, the tribunal would have found the posts to be a manifestation of the beliefs.

Secondly, the tribunal should have considered whether the school's actions were because of the manifestation of her protected beliefs or because of a justified objection to the manner of expressing those beliefs.

Thirdly, if the tribunal decided that the school's actions were because of a justified objection to the posts, it should have gone on to consider whether the disciplinary steps taken were a proportionate means of achieving a legitimate aim. This includes considering:

- if the aim is sufficiently important to justify the limitation of the right;
- if the limitation is rationally connected to that aim;
- whether the aim could be achieved through a less intrusive limitation; and
- whether the importance of the aim is outweighed by the severity of the impact of the limitation on the individual.

**When will disciplinary action for expressing protected beliefs be proportionate?**

The EAT provided in its judgment some very useful guidance on the factors which should be considered when deciding if action taken by an employer because of a justified objection to the manifestation of protected beliefs is proportionate in the circumstances. These include (in the context of social media posts):

- the tone, quantity and extent of the posts;
- the likely audience of the posts;
- the extent and nature of the intrusion on the rights of others in the posts, and any consequential impact on the employer's ability to run its business;
- whether the employee has made clear that the views expressed are personal, or whether they might be seen as representing the views of the employer;
- any potential power imbalance, given the nature of the employee's role and the position of those whose rights are intruded upon in the posts; and
- any potential impact of the posts on vulnerable service users or clients.

**Comment**

It will be interesting to see how this case is finally decided. Decisions in such cases are highly nuanced and fact-specific. However, this case does in part address the increasingly common argument from employers that it isn't what the employee thought or said that was in issue but the way they expressed it. Whether a particular employer's objection to social media posts expressing

an employee's protected belief is justified will depend on the circumstances of the claimant, including their role and profile with stakeholders, and the circumstances of the employer, including the risks of harm to the employer's reputation and to vulnerable people and children.

For internal disciplinary processes, this means ensuring that careful thought is given in the decision-making process to why the social media posts are objected to, and what particular risks can be evidenced or foreseen as likely in relation to service users and reputational damage. It also means considering, and documenting consideration of, alternative steps or sanctions which might achieve the aim of the employer without impacting as severely on the rights of the individual.

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